

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH – COURT NO. 03

SERVICE TAX Appeal No. 347 of 2012

[Arising out of OIO-STC-19-COMMR-AHD-2012 dated 29/03/2012 passed by Commissioner of Service Tax-SERVICE TAX - AHMEDABAD]

N P Patel & Co

9, 2nd Floor, Sukhsagar Complex,
Ahmedabad,
Gujarat

.....Appellant

VERSUS

C.S.T.-SERVICE TAX - AHMEDABAD

7 Th Floor, Central Excise Bhawan, Nr. Polytechnic
Central Excise Bhawan, Ambawadi,
Ahmedabad,
Gujarat- 380015

.....Respondent

APPEARANCE:

Shri Jigar Shah, Advocate, Shri Rahul Patel, CA for the Appellant

Shri. Vinod Lukose, Superintendent (Authorized Representative) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

FINAL ORDER NO.A / 11735 /2022

DATE OF HEARING:03.08.2022

DATE OF DECISION:23.11.2022

RAMESH NAIR

This appeal is directed against order-in-original No. STC/19/COMMR/AHD/2012 dated 29.03.2012 passed by the Commissioner of Service Tax, Ahmedabad.

2. The relevant facts that arise for consideration are that the appellant are engaged in the business of infrastructural and construction business. Intelligence was gathered by the revenue authorities and search was conducted at the premises of the Appellant. Investigation revealed that appellant had engaged in execution of following project:

- (i) Providing and laying of sewerage /drainage pipelines networks on behalf of Ahmedabad Municipal Corporation and Ahmedabad Urban Development Authority;
- (ii) Construction of building such a control room, structure and equipments, road, cable trench etc on behalf of Gujrat Energy Transmission Corporation Ltd;
- (iii) Construction of a Transport Terminal Comprising of shops over the land provided by Gujarat State Road Transport Corporation, under Build, Transfer and Lease (BTL) Scheme;
- (iv) Construction of Residential Houses for Gujarat State Police Housing Corporation Ltd., Gandhinagar;
- (v) Construction of Boy's Hostel Building for Navsari Agricultural University;
- (vi) General earth filling for the embankment construction behind retaining wall in Sabarmati River, Ahmedabad on behalf of Sabarmati River Front Development Corporation Ltd.

Though appellant had provided the above work/ services covered under the taxable services of works contract service, Commercial & Industrial Construction Services, Construction of Complex Service and the Site formation and Clearance, Excavation and Earth Moving and Demolition Service, not paid the service tax.

2.1 After detail investigation show cause notice dated 18.03.2011 was issued to the Appellant proposing service tax demand and to imposed penalty under Section 76, 77 and 78 of the Finance Act, 1944. Thereafter, after following the due process, the Learned Commissioner, passed the impugned order as under:

- (i) Confirm the demand of Service tax of Rs. 2,72,71,371/- under the category of "Works Contract Service" under Section 73(2) of the Finance Act, 1994.
- (ii) Confirm the demand of Service tax of Rs. 3,63,033/- under the category of "Commercial or Industrial Construction Services" under section 73(2) of the Finance Act, 1994.
- (iii) Confirm the demand of Service tax of Rs. 11,47,392/- under the category of "Construction of Complex Service" under Section 73(2) of the Finance Act, 1994.
- (iv) Confirm the demand of Service tax of Rs. 52,75,110/- under the category of "Site Formation and Clearance, Excavation, earth moving & demolition service" under Section 73(2) of the Finance Act 1994.
- (v) Order to recover interest on above confirmed demand
- (vi) Order for appropriation of the service tax amount of Rs. 20,27,734/- already paid against the confirmed demand.
- (vii) Impose penalty under Section 76 of the Finance Act.
- (viii) Impose penalty of Rs. 3,40,56,906/- under Section 78 of the Finance Act, 1994
- (ix) Impose penalty under 77(1)(a) of the Act.

Aggrieved by the impugned order of Learned Commissioner, the appellant has filed the present appeal.

3. Shri Jigar Shah, Learned Counsel With Shri Rahul Patel, Chartered Accountant appearing on behalf of appellant submits that demand of service tax of Rs. 16,09,803/- is confirmed under the taxable category of works contract service for construction work carried out for M/s Gujarat Energy Transmission Co. Ltd. is not sustainable. The said work was carried out for transmission of electricity and by virtue of Notification No. 45/2010-ST dated

20.07.2010 any services provided in relation to distribution or transmission of electricity is not taxable. He placed reliance on following judgments:

- Kedar Construction – 2015(37)STR 631 (Tri. Mum)
- Noida Power Company Ltd. – 2014(33)STR 383 (Tribunal)
- Purvanchal Vidyut Nigam Ltd. Vs. Commissioner – 2013(30)STR 259
- Vensa Infrastructure 2019 (31) GSTL 460 (Tri. Hyd)

3.1 He further submits that demand of Service tax under the taxable category of Commercial or Industrial Construction for construction of bus terminal for M/s GSRTC is not sustainable as the said work is not commercial in nature. There is exclusion in the definition of Commercial or Industrial Construction as defined in Section 65(25b) of the Finance Act, 1994 for government construction. Further transport terminals are specifically excluded from the definition of commercial or Industrial Construction services and are specifically exempted / not taxable.

3.2 He also submits that it is clear from the tender copy issued by M/s GSRTC that the Appellant has to use material and supply the services. The said services are properly classified under the taxable category of works contract services. In any case, the proper classification of Services performed for M/s GSRTC would be works contract service and therefore, not taxable under Commercial or Industrial Construction services as held by Ld. Commissioner. He placed reliance on the decision of M/s Real Value Promoters 2018-VIL-648-CESTAT-CHE-ST.

3.3 He further submits that demand of service tax under the taxable category of construction of complex services for Gujarat State Police Housing Corporation is not sustainable. From the definition of residential complex as defined in Section 65(91a) of Finance Act, 1994 it is clear that if the construction of complex is intended for personal use as residence by such person then it is not taxable. He placed reliance on the following judgments:

- Khurana Engineering Ltd. – 2011(21)STR 115(Tri. Ahmd)
- M/s S. Kadirval – 2018(6) TMI 926- CESTAT – Chennai

3.4 He further argued that in the said matter demand of service tax is also raised under the erroneous category of service. The nature of services is works contract, for this reason also the demand of service tax is not sustainable.

3.5 He also submits that demand of service tax under the taxable category of site formation and excavation services carried out for M/s Sabarmati Riverfront Development Corporation are directly in relation to construction of Road. Ld. Commissioner has erred in demanding the service tax under the category of site formation and excavation services. He produced the certificate issued by M/s Sabarmati Riverfront Corporation Ltd. Along with the site plan which specifically state that the work carried out by the Appellants was directly in relation to road. The said services is specifically classifiable under the taxable category of commercial or industrial construction services and it is specifically excluded in the taxable category of commercial or industrial construction services. The activity which is not taxable in one particular and specific entry of taxable services cannot be made taxable under any other category of services. He placed reliance on the decisions of Dr. Lal Path Lab Pvt. Ltd. 2006(4) STR 527 (Tri. Del).

3.6 He further submits that demand of service tax under the taxable category of works contract service for drainage and sewerage pipelines construction for Ahmedabad Municipal Corporation and Ahmedabad Urban Development Authority is not sustainable as it is non-commercial in nature. Within the definition of works contract services, there are specific exclusion provided. He placed reliance on the decision of Lanco Infratech – 2015 (38)STR 709 (Tri- LB).

3.7 He further contended that demand of service tax under the taxable category of construction of residential complex is confirmed for construction of Boys Hostel for Navasari Agricultural University. The said demand of service tax is confirmed under the erroneous category of construction of complex services. The construction of Boy's Hostel is not a residential complex. Hence the service tax demand not sustainable.

3.8 He also placed reliance on the following judgments in support of their above submission:

- CGST Vs. BMS Project Pvt. Ltd.- 2018(8) GSTL 13(Guj.)
- Rajendra Mittal Construction Company Pvt. Ltd. Vs. CCE- 2022 (3) TMI 1259 CESTAT (New Delhi)
- India Guniting Corporation Vs. CCE,- 2021(2)TMI 400-CESTAT, New Delhi
- Ashish Ramesh Dasarwar Vs. CCE- 2017-TIOL-3230-CESTAT -MUM
- Sem Construction Vs. CCE- 2020 (8)TMI 739 -CESTAT Ahmedabad
- Shree Hindustan Fabricators Vs. CCE- 2002(2)TMI -110-CESTAT - Ahmedabad
- Messrs N J Devani Builders Pvt. Ltd. Vs. UOI - 2020(11)TMI -798 (GUJ)
- Scone Global Pvt. Ltd. Vs. Commissioner of Service tax- 2022-VIL-550-CESTAT-DEL-ST
- Ramky Infrastructure Ltd. Vs. Commissioner of Central Tax - 2022-TIOL-682-CESTAT-HYD.
- ITD Cementation India Ltd. Vs. C.S.T. Mumbai-V- 2014(36)STR 897(Tri. Mumbai)

4. On the other hand, Learned Shri Vinod Lukose, Superintendent (Authorized Representative) reiterated the findings of the impugned order. He submits that Appellant's claim that their services are under 'Commercial or Industrial Construction services and not under Works Contract Service is not

acceptable as there is supply of goods also. Since the appellant's contract is supply of goods as well as Service same falls under works contract service. Apart from GETCO, Appellant has provided works contract service to AUDA and AMC and since the AMC is charging fees from the users, it cannot be termed as sovereign or philanthropic works and therefore service tax is liable to be paid on service of laying of sewerage /drainage pipe lines.

4.1 He also submits that it is not in dispute that appellant has provided construction service by way of constructing 149 shops as per Build Transfer & Lease Agreement with GSRTC. The contract of GSRTC clearly says that "Developer has only right to make construction on the land in question, and after construction, the commercial and non-commercial complex shall be transferred to GSRTC. Agreement with GSRTC clearly reveals that Appellant has provided Commercial and Industrial Construction Service.

4.2 He further submits that from the browsing of the website of Gujarat Police Housing Corporation, it is very clear that construction of Quarters made by the Appellant is not for personal use of GPHCL but after the completion of residential complex, the same is handed over to Police Department, Jail Department etc. Appellant has provided 'construction of complex' service to Navsari Agriculture University to construct Boys' Hostel. The University does not use the same for personal use but they give the same to students on prescribed fees.

4.3 He also submits that as per the definition envisaged under Section 65(97a) and taxable service under Section 65 (105 (zzza)) of the Finance Act, 1994 it is very clear that appellant has provided Site Formation and Clearance, Excavation and Earth Moving and Demolition Service to Sabarmati River Front Development Corporation. From the description of the work General Earth Filling of embankment construction behind retaining wall for the length of 575

m on East Bank of Subhash Bridge to mts down stream on river Sabarmati, the work is covered under the inclusive part of definition of 'Site Formation & Clearance, Excavation and Earth Moving and Demolition Service.

4.4 He further submits that entire case is investigated by DGCEI and during the investigation, it was found that appellant had provided various aforesaid services without payment of service tax and without service tax registration. Some of the agreement between service recipients have clearly mentioned that applicable service tax would be payable by the Appellant.

4.5 He placed reliance on the following judgments:

- Final Order No. A/11471/2019 dated. 18.07.2019 – Shree Gurukrupa Construction Company Vs. CCE, Rajkot.
- Commissioner Vs. L & T Ltd. -2012(26)STR J142 (Guj)
- Karnataka State Warehousing Corporation Vs. CST, Bangalore – 2010(19)STR 32(Tri. Bang)
- Karnataka Govt. Indurance Dept. Vs. Asst. CCE, Bangalore – 2012(26)STR521(Kar.)
- Katira Construction Ltd. Vs. CST, Rajkot – 2016(46)STR 329(Tri. Ahmd)
- Commissioner Vs. Lanco Infratech Ltd. 2016(43)STR J28 (SC)
- Central India Engineering Co. Vs. CCE, Nagpur – 2016(44)STR 657 (Tri. Mum)
- Chaitanya Constructions Vs. CST, Visakhapatnam –I 2015(38)STR 1146 (Tri. Bang)
- Deogiri Infrastructure Pvt. Ltd. Vs. CCE, Aurangabad – 2017(5)GSTL 45 (Tri.-MUM)
- Sew Construction Ltd. Vs. CCE, Raipur – 2011(22)STR 666(Tri. Del)

- Ambalal Chauhan Vs. CST, Raipur – 2020 (33) GSTL 187 (Chhattisgarh)
- Graphite India Ltd. Vs. CCE, Nashik – 2014(36)STR 948 (Tri. Mum)
- Sheladia Rites Vs. CST, Visakhapatnam –I 2019(27)GSTL 707(Tri. Hyd)
- Cellebrum Technologies Ltd. Vs. CCE, Chandigarh 2015-TIOL-1098-CESTAT –DEL
- Krishna Engineering Works Vs. CCE, Vadodara –I- 2019(22)GSTL -409 (Tri. Ahmd.)
- Greater Noida Industrial Development Authority Vs. CCE – 2015-TIOL-1008-HC-ALL-ST

4.6 After considering the submissions of both the sides at length and after going through various provisions of the Finance Act, 1994 and the various decisions relied upon by the appellant and revenue cited supra, we find that the issues involved in the present case is whether the appellants are liable to pay service tax on construction work carried out for M/s Gujarat Energy Transmission Corporation Ltd., construction work of laying of drainage/sewerage pipelines and related work carried out for Ahmedabad Urban Development Authority (AUDA) and Ahmedabad Municipal Corporation (AMC) under the works contract service; whether the construction of commercial complex consisting shops at Jasdan Bus Terminus carried out for Gujarat State Road Transport Corporation Ltd. (GSRTC) is taxable under the 'Commercial or Industrial Construction Service'; whether the construction of residential complexes carried out for Gujarat State Police Housing Corporation Ltd. and construction work carried out for Navsari Agricultural University is taxable service under "Construction of Complex Service" and whether the work carried out for M/s Sabarmati River Front Development Corporation Ltd.

is a taxable service under "site formation and clearance, excavation, earth moving & demolition services.

4.7 We find that in the present matter Appellants take the stand in respect of the disputed services that the contract work they had undertaken for which the service tax has been demanded, are exempted under the law from payment of service tax and as per the judgments relied by them. We also find force in claim of the Appellant. As regard the service provided to Gujarat Energy Transmission Corporation Ltd. we find that such services are exempted from payment of service tax in terms of Notification No. 45/2010 -ST dated 20.07.2010. The decisions relied upon by the Appellant in this context also support the claim of appellant, however we do not find any finding on this aspect in impugned order. Similarly from the definition of "commercial or industrial construction service" defined in Section 65(25b) we also find that the said definition exclude the services provided in respect of road and transport terminals. The definition of residential complex as defined in Section 65(91a) of Finance Act 1994 also does not include a complex which is intended for personal use as residence, the explanation clause of said definition also defined personal use includes permitting the complex for use as residence by another person on rent or without consideration. The Notification No. 17/2005 -S.T. dated 07.06.2005 exempts Site Formation and clearance, excavation and demolition and such other similar activities carried out in the course of construction of roads, Airports, Railways, terminal, bridges, tunnels, dams, ports or other ports etc. from the levy of service tax. In respect of other services also appellant claim the service tax exemption. In support of their arguments appellant also produced work orders issued by Ahmedabad Municipal Corporation, Gujarat State Police Housing Corporation Ltd., Navsari Agricultural University, Gujarat State Road Transport Corporation and Sabarmati River Front Development Corporation Ltd.

4.8 We also find that in the impugned matter the as regard the exemptions appellant also not produced their claim properly before the adjudicating authority with supporting documents. It is seen that the Ld. Commissioner has also not examined the claim of appellant properly, therefore, we find it appropriate to remand the matter to the Commissioner to examine this issue afresh, after taking into consideration the documents/ details /contracts /agreements and judgments relied upon by the appellant in support of service tax exemption.

4.9 In this scenario, we find that the lower adjudicating authority has not considered all the issues in the light of the legal authorities and judicial pronouncements while deciding the issue. Accordingly, we set aside the impugned order and remand the case back to the adjudicating authority for consideration of all the issues and thereafter to pass an order afresh after giving reasonable opportunity to the appellant of being heard. Appeal is allowed by way of remand to the Adjudicating Authority.

5. Appeal is disposed of by way of remand to the adjudicating authority.

(Pronounced in the open Court on 23.11.2022)

RAMESH NAIR
MEMBER (JUDICIAL)

RAJU
MEMBER (TECHNICAL)